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SUPREME COURT OF THE UNITED STATES

_____ TERM, 1945

No. 1065

OIL WORKERS INTERNATIONAL UNION,
LOCAL 463, et al.,
Petitioner and
Appellant below,

vs.

TEXOMA NATURAL GAS COMPANY,
Respondent and
Appellee below

PETITION FOR WRIT OF CERTIORARI
and
PETITIONER'S SUPPORTING BRIEF

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No. .....

OIL WORKERS INTERNATIONAL UNION, LOCAL 463, et al.,
Petitioner and
Appellant below,

vs.

TEXOMA NATURAL GAS COMPANY,
Respondent and
Appellee below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of Matter Involved

This is a suit brought in the United States District Court for the Northern District of Texas by the Texoma Natural Gas Company, respondent herein, against

petitioner herein, for a declaratory judgment as to respondent's rights and obligations growing out of an arbitration and award directed by the National War Labor Board (Tr., Page 1). The trial was by the Court and a judgment was rendered in favor of respondent and against petitioner setting aside said award (Tr., Page 110). An appeal from said judgment was taken by petitioner to the United States Circuit Court of Appeals, Fifth Circuit, which affirmed the judgment of the District Court (Page 346 of Tr.).

Statement of Facts

The Oil Workers International Union, Local No. 463, petitioner, is a labor organization and as such entered into a collective bargaining agreement with the Texoma Natural Gas Company, respondent, on August 27, 1942, effective September 1, 1942, covering certain employees of the Company's Compressor Station and Gasoline Plant located at Fritch, Texas (Tr., Page 114).

The controversy between the parties arose when, on October 16, 1942, the respondent returned one of its employees from a supervisory position to the position of main engineer in its engine room, which latter position is subject to the seniority provisions set forth in Article III of the collective bargaining contract (Tr., Page 115). The petitioner contended that the respondent had no right under the contract to permit the employee to fill the job of main engineer, because he was not next in line to fill the same by virtue of

the seniority provisions. The respondent contended that its action was fully justified under the contract.

A further controversy arose when, on and before October 25, 1942, the respondent extended its normal work week from 40 hours to 48 hours. Petitioner contended that the length of the work week is a subject of negotiation between the parties, and the respondent contended that the question is solely a function of management.

On November 20, 1942, petitioner filed with respondent a written complaint regarding the above contentions on the two controversies and after certain correspondence between the parties, on December 3, 1942, informed the respondent that they desired to arbitrate the matters pursuant to Article 12 of the contract (Tr., page 123), to which the respondent declined and insisted that the matters were not arbitrable.

The entire matter was certified to the Eighth Regional War Labor Board and a hearing was held before a panel of said Board on the matter of the complaint on April 19, 1943. The respondent still contended before the Board that the controversies were not arbitrable and that the Board did not have jurisdiction.

On July 3, 1943, the Eighth Regional War Labor Board, acting as the duly authoried agent of the National War Labor Board, adopted the minority recommendations of the Panel Chairman and Public Chairman Wales H. Madden (Tr., Page 227) in that he recommended that the Board decline to accept juris-

diction over the dispute on a merit basis, but modified such minority recommendation in that the Board directed the parties to forthwith proceed with arbitration of the issues as provided for under the terms of the collective bargaining contract (Tr., Pages 240, 241).

Thereafter, over the objections of respondent as to the arbitrability of the two issues, the matters were submitted to a Board of Arbitrators composed of three members. On October 20, 1943, said arbitrators issued their majority award directing that the employee be removed from the job as main engineer and that the respondent negotiate with petitioner regarding the extention of the work week (Tr., Pages 30 to 36).

On October 27, 1943, the respondent filed its complaint in the United States District Court for the Northern District of Texas, seeking a declaratory judgment as to their rights and obligations, pursuant to the award of the arbitrators (Tr., Page 1).

On October 28, 1943, Petitioner filed its petition for enforcement of the award with the Eighth Regional War Labor Board (Tr., Page 164), and on November 12, 1943, filed their petition for a strike vote with the National Labor Relations Board, pursuant to the procedure of the War Labor Disputes Act (commonly called Smith-Connally Act) (Tr., Page 196).

In response to respondent's complaint, petitioner moved for dismissal for the several reasons set forth hereinafter under "Reasons Relied on for The Allowance of The Writ."

II.

Jurisdiction to Review Judgment

The decision of said Circuit Court of Appeals was rendered December 1, 1944; and the order denying petitioner's Petition for Rehearing was entered January 3, 1945 (Page 350 of Tr.). Mandate was issued January 23, 1945. The statutory provision which sustains the jurisdiction of this Court is Section 347 (a) of Title 28 of the United States Code. Pursuant to Section 350 of Title 28 of the United States Code, petitioner may bring this application within 3 months after denial of said Petition for Rehearing by said Circuit Court of Appeals. *(Aspen Mining & Smelting Co. vs. Billings,* 150 U. S. 31).

III.

Questions Presented

The questions presented on appeal to said Circuit Court of Appeals, which were adversely decided as to petitioner, and here presented for this Court's determination are:

1. Does an arbitration and award directed by the National War Labor Board, pursuant to the War Labor Disputes Act (57 Statute 163, ch. 144, June 25, 1943, Appendix "A"), constitute or create a "justiciable controversy" or "actual controversy," in the absence of and independent of other contentions and positions of the parties, sufficient to vest jurisdiction of the Federal Courts under the Declaratory Judgment Act, Section 400, Title 28 of the United States Code? (Tr., Page 241). (See Appendix "C").

2. May the Courts review or declare the rights and obligations of the parties resulting from arbitration awards directed by the National War Labor Board, before such parties have exhausted their administrative remedy of review before such Board, pursuant to its rules, regulations and policies, (Tr., Page 255) and especially while such issues are concurrently pending before said Board for "adjudication, settlement, and final determination" as prescribed by the War Labor Disputes Act (Tr., Page 164). (See Appendix "A").

3. Should a declaratory judgment be denied where another remedy will be more effective under the circumstances?

4. Does due notice of a desire to "amend" a collective bargaining contract, given pursuant to a contractual right to terminate such agreement upon the annual renewal date, constitute a termination of the agreement? (Tr., Pages 114, 127 to 129).

IV.

Reasons Relied on for the Allowance of the Writ

A.

The decision of said Circuit Court of Appeals, by holding that an arbitration award directed by the National War Labor Board creates a justiciable controversy between the parties, is in conflict with the decisions of the United States Court of Appeals for the District of Columbia, in the case of *Employers Group of Motor Freight Carriers, Inc., et al, vs. National War Labor Board*, 143 Fed. 2nd. 145, certiorari denied 65 S. Ct. 72, and in the case of *National War Labor Board*

et al. vs. Montgomery Ward & Company, 144 Fed. 2nd. 528, certiorari denied — U. S. —, Nov. 13, 1944.

B.

The decision of said Circuit Court of Appeals, holding that the Courts have jurisdiction, by declaration to review or determine issues growing out of National War Labor Board directives, even while such issues are pending before such Board, is in conflict with decisions of the same Circuit Court of Appeals in the same cases cited in "A" above.

C.

The decision of said Circuit Court of Appeals by holding that the Courts may take jurisdiction over the labor dispute while the dispute is pending before the National War Labor Board, by declaration, and before the parties exhaust their adminitsrative remedy of review before said Board, is in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit, on the same matter, in *Aetna Casualty Company vs. Quarles*, 92 Fed. 2nd 321, and with the decision of the United States Court of Appeals for the District of Columbia in the case of *Washington Terminal Company vs. Boswell*, 124 Fed. 2nd 235, certiorari denied 62 S. Ct. 916, and with the decision of the United States Court of Appeals for the District of Columbia in the case of *Utah Fuel Company vs. Bituminous Coal Commission*, 101 Fed. 2nd 426 and 59 S. Ct. 253.

D.

The decision of the said Circuit Court of Appeals as to the effective and valid continuation of the collective bargaining contract between the parties, after due notice by petitioner of its desire to terminate ("amend") said contract pursuant to its option, by holding that said contract is still in full force and effect, is in conflict with the numerous decisions of the National Labor Relations Board relating to questions concerning representation pursuant to the National Labor Relations Act, and involves an important question of Federal and local law which has not been, but should be, settled by this Court.

E.

The great importance of the War Labor Disputes Act (commonly called "Smith-Connally Act") (see Appendix "A"); the importance of a speedy and effective administrative process in settling labor disputes; and the importance of stable collective bargaining contracts, especially during the present National War Emergency, involved in the present business and economic world and legal profession, and the need of an authoritative and elucidating decision thereon, calls for an exercise of this Court's power of supervision.

III.

Transcript of Record

Your petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10971, Oil Workers International Union, Local No. 463, et al, Appellants, vs. Texoma Natural Gas Company, Appellee, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated February 28, 1945.

Lindsay P. Walden
Counsel for Petitioner

Lindsay P. Walden

PETITIONER'S SUPPORTING BRIEF

Opinions Below

The memorandum opinion of the Trial Court (U. S. District Court for Northern District of Texas) appears at Page 66 of the Transcript.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, delivered December 1, 1944, appears at Page 338 of the Transcript, and is reported in — Fed. 2nd., Page —.

Jurisdiction

The statutory provisions which sustain the jurisdiction of this Court are fully set forth in Paragraph II of the Petition for Writ of Certiorari hereto attached. Statement of Reasons Relied on for Allowance of Writ appears in Paragraph IV of said Petition.

Statement of the Case

Paragraph I of the Petition for Writ of Certiorari sets forth the matters, facts and proceedings involved which are material to the questions here presented.

Specification of Errors to Be Urged

The United States Circuit Court of Appeals, Fifth Circuit, erred:

(1) In holding that a justiciable controversy existed between the parties, appropriate for judicial determination under the Declaratory Judgment Act (Sec. 400, Title 28, U. S. Code) (see Appendix "C"), where such controversy resulted from an arbitration award

directed by the National War Labor Board, pursuant to the War Labor Disputes Act (see Appendix "A"), and where no attempt or threat to enforce such award is made except through said National War Labor Board, and where no adverse contention as to its legal effect or force is made prior to the institution of suit.

(2) By holding that the pendency of a labor controversy before the National War Labor Board is not a bar to a suit for Declaratory Judgment in the Courts, and particularly in that such decision is not sound judicial discretion as contemplated by the Declaratory Judgment Act in vesting jurisdiction.

(a) Since the National War Labor Board was established by law to "finally determine labor disputes which *might* interrupt work which contributes to the effective prosecution of the *war*," the Court should have exercised its lawful discretion and dismissed the suit.

(3) By holding that the exhaustion of the administrative remedies granted by the War Labor Disputes Act and Executive Order No. 9017, of January 12, 1942 (see Appendix "B"), to employer and employee is not a prerequisite to the bringing of a Court action by either party for an alleged violation by the other of a labor agreement.

(a) The error is especially apparent in such decision in that the matter was already before the National War Labor Board, which Board reserved the right and gives the right of review of arbitration awards, which right of review was not availed before institution of suit.

(4) By holding that the collective bargaining con-

tract between the parties is in force and effect even after due notice by petitioner of its desire to terminate ("amend") said contract pursuant to its option to terminate.

Summary of Argument

Petitioner contends that respondents suit does not allege or support a finding that a justiciable controversy as contemplated by the Declaratory Judgment Act, exists between the parties; that declaratory relief should be denied where other special or statutory remedies are available, where another remedy will be more appropriate under the circumstances, where such declaratory relief interferes with administrative proceedings, at a point where it could not, under settled principles, have interfered with or stopped them under its power to enjoin, or where the parties have not exhausted their administrative remedy of administrative review; that an arbitration award directed by the National War Labor Board is not subject to judicial review or enforcement; and that a notice by one party to another of its desire to terminate or "amend" a collective bargaining contract pursuant to an option to so terminate, constitutes a termination thereof, and thereby a suit as to rights and obligations thereunder become moot.

ARGUMENT

I.

No Justiciable Controversy

As heretofore pointed out, this labor dispute arose when the parties were required by directive of the National War Labor Board to arbitrate two disputed issues. On October 20, 1943, an award was rendered in favor of petitioner (Pages 30 to 36 Tr.). One week later, October 27, 1943, respondent brought this suit to declare its rights and obligations as to said award and under the collective bargaining contract (Page 114 Tr.). Respondent's complaint (Page 1 Tr.) does not allege, and no evidence shows nor does the findings of fact show (Pages 50 and 66 Tr.), that petitioner threatened or attempted to enforce said award by suit or otherwise, except through such relief as may be available by virtue of the War Labor Disputes Act (Pages 164 and 196 Tr.), nor had they contended that such award was enforceable in law. Hence, there was no real, actual or justiciable controversy concerning said award, because, even if petitioner should have obtained an order of said Board enforcing said award, such order would not be reviewable or enforceable.

The United States Court of Appeals for the District of Columbia in the case of *Employers Group of Motor Freight Carriers et al. vs. National War Labor Board et al.*, 143 Fed. 2nd. 145, certiorari denied 65 S. Ct. 72, stated:

> "It is clear and undisputed that no statute authorizes review of the War Labor Board's or-

> ders. As we point below, the legislative history of the War Labor Disputes Act implies a positive intention that these orders should not be reviewable. Aside from that important and probably conclusive fact, the question is whether general equitable principles authorize review. We think they do not."

Again, even if petitioner should have been successful in obtaining a further order of the National War Labor Board enforcing said award, which was the only action or contention threatened or attempted, such further order would not have created a justiciable controversy. The Court further speaking in the foregoing Motor Freight Carriers case stated:

> "Any action of the Board would be informatory and 'at most, advisory.' Appellants demand that we annul and enjoin the Board's order therefore amounts to a demand that we prevent the Board from giving the President *advice* which appellants contend would be erroneous * * * . The correctness of administrative advice cannot be reviewed by the Courts. They have neither the necessary authority nor the necessary qualifications for such work."

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act, (see Appendix "C") is necessarily one of degree. *Maryland Casualty Co. vs. Pacific Co.*, 312 U. S. 270, 273. But, "basically," the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests,

of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Helco Products Co. vs. McNutt*, 137 Fed. 2nd. 681. The facts alleged and the evidence in this case do not show such a controversy. In fact no contentions or threats of enforcement are plead or shown, except that petitioner sought an order ("advise") of the National War Labor Board.

In the case of *National War Labor Board, et al. vs. Montgomery Ward & Co., Inc.* decided July 19, 1944, by United States Court of Appeals, District of Columbia, 144 Fed. 2nd 528, certiorari denied November 13, 1944, the Court again stated that the "War Labor Disputes Act does not make the Board's orders enforceable or reviewable."

A declaratory judgment may not be granted merely because the challenged directive order of the National War Labor Board may be invalid. Respondent must further have shown that a "case of actual controversy" exists as a basis for the Court's assumption of jurisdiction over the subject matter of the action. Act of June 14, 1934, 48 Stat. 955; 28 U. S. C. 400 (see Appendix "C"). To present such a "case of actual controversy" action by the defendants must be shown "of a definite and concrete character, constituting an actual or threatened interference with the rights of the persons complaining." *Ashwander vs. T. V. A.*, 297 U. S. 288, 324;*Great Lakes Dredge & Drydock Co. vs. Huffman*, 319 U. S. 293;*Aetna Life Insurance Co. vs. Haworth*, 300 U. S. 227, 240; *Electric Bond and Share Co. vs. S. E. C.*, 303 U. S. 419; *Bradley Lumber Co. vs. N. L. R. B.*, 84 Fed. 2nd. 97 (C.C.A. 5), certiorari de-

nied, 299 U. S. 559; *Helco Products Co., Inc. vs. McNutt*, 137 Fed. 2nd. 681 (App. D. C.); *J. P. Agnew & Co. vs. Hoage*, 99 Fed. 2nd. 349 (App. D. C.); *Smith vs. American Asiatic Underwriters, Inc.*, 127 Fed. 2nd. 754, 756-757, affirmed on rehearing, 134 Fed. 2nd. 233 (C.C.A. 9). Respondent failed to allege or show such action by petitioner.

It is plain that the issuance of the directive order of the National War Labor Board, directing the parties to arbitrate, and that any further order directing compliance therewith did not and would not in any wise affect the legal rights of the respondent, and that its continued effectiveness could not and would not effect such rights. Respondent's allegations of contentions to petitioner cannot give rise to a controversy in the constitutional sense. For, in view of the clear pronouncements by the Courts that War Labor Board directive orders do not affect legal rights and cannot be forced in law, such contentions, if indeed any were made, were but idle opinions. Whatever may have been the contentions of the petitioner could not vary the character of the Board's directive order to arbitrate nor the results thereof. Mere abstract contentions cannot serve to confer jurisdiction on the Courts. The authorities are clear that in such circumstances the Courts are without equity jurisdiction. *Federal Trade Commission vs. Claire Furnace Co.*, 274 U. S. 160; *Yarnell vs. Hillsborough Packing Co.*, 70 Fed. 2nd. 435 (C.C.A. 5); *Janes vs. Lake Wales Citrus Growers Association*, 110 Fed. 2nd. 653 (C.C.A. 5); *City of Osoeola vs. Utilities Holding Corp.*, 55 Fed. 2nd. 155 (C.C.A. 8); *Whitehead vs. Cheves*, 67 Fed. 2nd. 316

(C.C.A. 5), certiorari denied, 290 U. S. 704; *Bookbinders Trade Association vs. Book Manufacturers Institute*, 7 F. Supp. 847 (SDNY).

In the case of *Bookbinders Trade Association, Book Manufacturers Institute*, supra, the Court said:

> "A suit for an injunction will not be entertained where those who are said to threaten injury to the plaintiff admittedly have not the power or ability to carry their threats into effect."

The same jurisdictional principles which guide Courts of Equity are applicable for suits of declaratory relief. *Great Lakes Dredge & Drydock Co. vs. Huffman*, 319 U. S. 293; *Ashwander vs. T. V. A.*, 297 U. S. 288.

Petitioners contend that respondent's suit should have been dismissed because the complaint and the evidence show no actual or justiciable controversy between parties on which the Courts could grant relief.

II.

Declaratory Judgment Should Be Denied Where Same Controversy Is Pending Before the National War Labor Board

On July 3, 1943, the Eighth Regional War Labor Board directed the parties to forthwith proceed with arbitration of the disputed issues as provided for under the terms of the collective bargaining contract (Page 241 of Tr.). The directive order did not dismiss the case before the National War Labor Board and it is assumed that it retained jurisdiction to effectuate its order as Executive Order 9017, issued

January 12, 1942, (see Appendix "B") creating the National War Labor Board, charged, "the Board shall finally determine labor disputes which might interrupt work which contributes to the effective prosecution of the war." In finally determining a labor dispute, we cannot conceive that the Board would direct arbitration and then not retain jurisdiction to finally effectuate its terms and results.

On October 28, 1943, petitioners filed their petition for enforcement of the award (eight days after said award had been made and one day after respondents filed this suit) with the Eighth Regional War Labor Board (Defendant's Exhibit No. 1, Page 164 of Tr.), and on November 12, 1943, filed their petition for a strike vote with the National Labor Relations Board, as an economic means of persuading respondent to comply with said award, pursuant to the War Labor Disputes Act (Defendant's Exhibit No. 4, Page 196 of Tr.). These actions occurred prior to the hearing in the District Court.

The declaratory judgment procedure (Section 400, Title 28, U.S.C.) is an improper remedy under the facts in this case. The primary purpose of that statute is to give relief in situations in which it was not previously available, not to displace existing, *particularly special remedies devised for particular situations. Washington Terminal Co. vs. Boswell*, 124 Fed. 2nd. 235, certiorari denied 62 S. Ct. 916.

The National War Labor Board and its Regional Boards were empowered with full and exclusive authority to adjudicate, settle, and finally determine any

and all labor disputes affecting the national war effort by Executive Order No. 9017 of January 12, 1942 (see Appendix "B") and the War Labor Disputes Act (see Appendix "A"). Thereby an *existing special remedy has been devised for a particular situation*, to wit, to adjudicate, settle, and finally determine any and all labor disputes. The entire complaint in this case involved a labor dispute between the parties.

The Declaratory Judgment Act should not be used as an instrument of procedural fencing, either to secure delay or to choose a Court or other forum. *Aetna Casualty vs. Quarles*, 92 F. 2nd. 321. In this case, the National War Labor Board had acquired jurisdiction, directed arbitration, and was in the process of making a final adjudication and determination of the labor dispute. The Court, by making a decision, permitted respondent to choose the forum of the Court rather than the forum of the Board, thereby removing jurisdiction from the Board. The nature of the relief contemplated by the Declaratory Judgment Act requires that when the Court takes jurisdiction, it should do so to the exclusion of other tribunals. *Standard Accident Insurance Co. vs. Grimmett*, 32 F. Supp. 81.

A declaratory judgment should be denied where another tribunal has jurisdiction in the issues, where proceedings involving identical issues are pending in another tribunal, where special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances. *Aetna Casualty Co. vs. Quarles*, 92 F. 2nd. 321; *Maryland Casualty Co. vs. Boyle Construction Co.*, 123 Fed.

2nd. 558; and *Western Electric Co. vs. Hammond*, 135 F. 2nd. 283.

The most effective and appropriate remedy in this case would have been to have permitted the Board to retain jurisdiction to review the award which it had directed. We cannot assume that the Board would have arrived at any different conclusions from that of the Court in reviewing the merits of the arbitration award. As stated by the Public Panel Member of the Board (Page 227 to 229 of Tr.), which report was adopted by the Board as its order (Pages 240 and 241 of Tr.), "if such an occasion arose and a Board of Arbitrators patently disregarded the plain provisions of the contract, entertained jurisdiction over the objection of the Company, and disposed of the case contrary to the provisions of the contract, then surely the aggrieved party could resort to this Board and probably to the Courts for relief."

The National War Labor Board, by its statement of "policy concerning review of arbitration awards," Paragraphs III and IV (Page 255 of Tr.) reserves the right of review and will undertake to declare and enforce the rights and obligations of the parties when such disputes come properly before the Board regardless of the fact that there may be available other procedures for enforcement.

District Courts cannot declare rights in any case where the declaration under all the circumstances is not necessary or proper at the time. *Angell vs. Schram*, 109 F. 2nd. 380; and *Duart Manufacturing Co. vs. Philad Co.*, 31 F. Supp. 548. Since the Board retained

the right of review and is authorized by law to direct both parties to abide by its final decisions, and affords the right of review of arbitration awards, in the interest of expediting the war effort, it would have been better and appropriate for the Court to have left that specialized, administrative tribunal with the right of review.

Executive Order 9017 (7 Fed. Register, 237, Appendix "B") was issued on January 12, 1944. It established the tripartite National War Labor Board for the peaceful adjustment of labor disputes, in accordance with the no strike-no lockout agreement reached among the representatives of labor and industry who had met at the conference called by the President on December 17, 1941, to assure that the effective prosecution of the war, in which the nation had just engaged, would not be hampered by labor disturbances. The Executive Order authorized the Board, after it had assumed jurisdiction, through certification from the Secretary of Labor or on its own motion, of "labor disputes which interrupt work which contributes to the effective prosecution of the war" to "finally determine the dispute"; and for that purpose the Board might "use mediation, voluntary arbitration, or arbitration under the rules established by the Board."

It appears that the Court should have withheld jurisdiction in this case until such time as the matter had been finally determined by the National War Labor Board. Effective administration of the vital war time program to avoid and adjust labor disputes depends upon a vigorous public opinion antipathetic to labor

disturbances in war industries, and upon the patriotic cooperation of management and labor in complying with War Labor Board orders. The challenge to the War Labor Disputes Program which the declaration in this case creates is a serious injury to the public interest. "Where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a Court of Equity acts with caution and only on clear showing that its intervention is necessary in order to prevent an irreparable injury." *Hurley vs. Kincaid*, 285 U. S. 95, 104. The considerations animating the Courts in refusing injunctive relief to private persons where such relief would encourage the disregard of the established governmental procedures for the effective prosecution of the war are well expressed in *Kittrell vs. Hatter*, 243 A.L.A. 472, 10 S. O. 2nd. 827, 832:

> "This Court here now finds and declares as a matter of current history within the knowledge of all men that the urgent necessity to produce all the sinews of war, a mechanized global war, has necessitated War Production areas, disrupting the normal law of supply and demand—that speed in the production of the sinews of war is of the essence of the war effort and that the interposition of restraining orders or injunctions issued by State and inferior Federal Courts will hinder and handicap the war effort, the paramount necessity of the hour. These public interests should not be subordinated to the personal rights of any individual."

The Supreme Court of the United States found it necessary recently to reiterate this long-established rule in its opinion in *Jankus vs. United States*, 321 U. S. 414, 440-441:

> "Where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the Court may, in the public interest, withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff * * * . This but another application of the principle, declared in Virginian Railway Co. vs. System Federation, 300 U. S. 515, 552, that 'Courts of Equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' "

This suit should have been dismissed because the labor dispute was pending before the National War Labor Board.

III.

Exhaustion of Administrative Remedies Before Declaratory Relief Is Granted

After the arbitration award was made, pursuant to the directive order of the National War Labor Board, respondents did not seek review thereof by said Board, and did not ask review thereof in response to petitioners' petition for enforcement of said award filed with the Eighth Regional War Labor Board on October 28, 1943, (Defendant's Exhibit No. 1, Page 164 of

Tr.), but filed this suit one week after the rendition of said award.

As has been heretofore stated, the National War Labor Board, by its statement of "policy concerning review of arbitration awards" Paragraphs III and IV (Page 255 of Tr.) reserves the right of review and will undertake to declare and enforce the rights and obligations of the parties when such disputes come properly before the Board, regardless of the fact that there may be available other procedures for enforcement.

The Court, speaking in the matter of *Utah Fuel Co. vs. Bituminous Coal Commission*, 101 Fed. 2nd. 426, certiorari denied 59 S. Ct. 253, stated:

> "The new power given to the Federal Courts to render a declaratory judgment does not authorize a Court of Equity by declaration to stop or interfere with administrative proceedings, at a point where it could not, under settled principles, have interfered with or stopped them under its power to enjoin."

Although the National War Labor Board was not made a party to these proceedings, by indirection, the declaration did interfere with and stop the administrative proceedings, even before a review of the award had been made. The nature of the relief contemplated by the Declaratory Judgment Act requires that when the Court takes jurisdiction it should do so to the exclusion of other tribunals. *Standard Accident Insurance Co. vs. Grimmett*, 32 F. Supp. 81. Hence, the Court, by making a declaration in this case, took juris-

diction of the dispute to the exclusion of the Board before said Board could make a final determination as to whether or not it would direct compliance with the arbitration award which it had originally directed.

The respondent should have been required to have exhausted the administrative remedy (War Labor Board review) before seeking relief through the Courts, especially since the administrative board directed the arbitration and retained jurisdiction. If parties to a labor dispte in time of war are permitted to come into Court under the declaratory statute prior to exhausting their administrative remedies, it may conceivably be that the Courts will be substituted for the functions of the administrative tribunal and thereby hamper the war effort.

It is difficult to imagine that the already-crowded Courts could undertake to review, hear and finally determine all issues that might arise in labor disputes, particularly before the parties completed use of the administrative procedure provided for such purposes. With the statutory restrictions upon the Federal Courts to restrain labor organizations in their economic right to strike, certainly the Courts are not the appropriate tribunal to effectuate the purposes of the War Labor Disputes Act.

In this immediate dispute, the War Labor Board could have, prior to the declaration, directed both the petitioner and the respondent to continue to work and to produce pending final settlement of the dispute and could have applied sanctions upon either party that might not abide by its decisions. The Courts

are not charged with such functions and are not experts in the field of labor relations.

Respondent's complaint should have been dismissed or withheld until such time as the administrative remedies had been exhausted.

IV.

Termination of Collective Bargaining Contract

The collective bargaining contract between the respondent and the petitioner (Page 114 of Tr.) was dated August 27, 1942, and became effective September 1, 1942, and, among other things, provided:

> "It shall remain in effect from year to year thereafter until terminated by written notice given by either party to the other at least thirty (30) days prior to the termination of any such period."

On July 30, 1943, more than 30 days prior to the first annual expiration date, the petitioner wrote the respondent (see Pages 127 to 128 of Tr.) of its desire to "negotiate amendments" to the agreement.

In reply to the above letter, the respondent wrote the petitioner asking whether such letter "is intended to serve as notice of termination of the contract between the Union and the Company" (see Page 128 of Tr.).

On August 20, 1943, petitioner advised respondent as follows (see Page 129 of Tr.):

> "Relative to your inquiry, if my letter of July 30, 1943, was intended to serve as a notice of

termination of the contract between the Union and the Company, as set out in Section I, Article 1, of the agreement, I wish to say that we did not intend to cancel the entire agreement, but do wish to make certain amendments to the contract for the purpose of clarification. I have not read the amendments that the employees have prepared, therefore, I am not in a position to state these amendments.

"If you do not desire to go into negotiations to make such amendments without terminating the present agreement, we shall then naturally ask to terminate the present agreement and proceed to negotiate another one."

It is a well-founded principle of law that a contract must be mutually agreed upon. A party to a contract in exercising his option to cancel, cannot cancel a part of the agreement without cancelling the entire agreement, except by mutual consent. In this instance, the parties did not so mutually agree, hence, the entire agreement must fall.

All notice given by the petitioner to the respondent indicates that petitioner was not pleased with all of the provisions of the agreement and that, upon the annual expiration date, they desired a different contract. Although some of the provisions were satisfactory, the petitioner indicated that some were not satisfactory. The notice having been timely given, the parties were in a position by operation of law of contracting de novo.

We do not find any Court decisions which touch upon this aspect of collective bargaining contracts.

Considering this situation in the light of customary labor relations, the petitioner must have meant that it was willing to incorporate certain provisions of the expired agreement into a new agreement, but that the full expired agreement was not satisfactory for the purpose of renewing their contractual relationship. If amendments are added, certainly the parties are in a new contractual relationship. To do this, the parties must negotiate and agree upon such changes. The petitioner gave specific notice of its desire to "negotiate amendments." It is customary in negotiating new collective bargaining agreements for such subsequent negotiations to be confined to subjects of which the parties are not in full accord. It would be needless to re-negotiate provisions of expired agreements which are mutually agreeable to all parties.

There can be no doubt but that the petitioner intended by its written notice to terminate the agreement, and in order to maintain a contractual relationship and continued production, advised the respondent that it desired to negotiate a new agreement which would be partially the same as the terminated contract, as well as carrying additional or revised provisions. It is customery in labor relations for the parties to agree to continue a terminated contract from day to day until such time as a new contract has been re-negotiated which, naturally, would include many of the provisions of the terminated agreement.

Collective bargaining contracts are not strictly constued but are liberally construed in order to effectuate industrial peace and the purposes of collective bargaining.

Since we have no Court precedents directly touching on this question, we wish to cite the following official administrative decisions by Governmental agencies charged with the duty of maintaining industrial peace in the field of labor relations. "In any case such interpretations are entitled to great weight." *United States vs. American Trucking Associations* (S. Ct.), 310 U. S. 534.

In the matter of *Great Bear Logging Company and Lumber and Saw Mill Workers Union*, 59 NLRB No. 141, Labor Relations Reporter No. 15, Page 439, the National Labor Relations Board held:

> "The Board has held that a request for modifications much less in scope than those asked for in the instant case was substantial enough to serve notice of contract termination rather than merely a notice of a desire for modfiication. In any event, a request for modifications substantial enough to require extended negotiations between the parties, as was here required, shows an election to terminate."

In re *American Woolen Co. & United Textile Workers of America*, 57 NLRB No. 107, Labor Relations Reporter No. 14, Page 737, the same Board ruled that a letter from a contracting union proposing changes in contract and submitted to employer prior to automatic renewal date of contract is viewed as a notice of termination of existing contract and request for the execution of a new one, despite contention of union that the proposed changes were merely demands for modifications of an existing contract and that no notice of termination was given.

In addition to the above cited cases, there are several hundreds of other similar cases reported by the National Labor Relations Board. This administrative policy is so well-founded that it has become customary for contracting unions to write letters to the contracting employer seeking to "modify" or "amend" existing agreements upon their annual expiration date, rather than to use the actual word "terminate."

The National Labor Relations Act (49 Stat. 449), Sec. 8 (5) requires an employer to bargain collectively with the representatives of his employees. "The Act imposes upon the employer the further obligation to meet with his employees' representatives respecting proposed changes of an existing contract," said the United States Supreme Court in *N.L.R.B. vs. Sands Mfg. Co.*, 306 U. S. 332. In view of this decision holding that the duty to bargain collectively is continuous, it becomes immaterial whether petitioner gave notice to respondent that it desired to negotiate an *entirely* new agreement upon the renewal date of the contract, or that it desired to negotiate amendments to the agreement. In either case, respondent was obligated to bargain, and if amendments were agreed upon, a new contract would become effective, even though it incorporated some or all of the provisions of the former contract. The petitioner would be under a like obligation to bargain concerning elimination of provisions in the former agreement which were unsatisfactory to respondent.

It is against the public policy to require the continuation of a collective bargaining contract beyond its annual renewal date after the employees' representatives

have given timely notice to the effect that the agreement is not satisfactory. To require a strict choice of words, such as "terminate," would do a grave injustice to the employees, who, for economic reasons must necessarily work another year under such agreement. Such strict construction could easily discourage the employees, impair production and create industrial strife, the very same conditions which the legal obligations of collective bargaining intended to correct.

There is a broad difference between a collective bargaining contract, wherein the parties are required to bargain, and a contract respecting sales, services, etc., wherein there is no legal obligation to bargain at all.

This question becomes extremely important because of the rulings of the National Labor Relations Board, an expert tribunal established to effectuate collective bargaining, in that such rulings conflict with the decision of the Circuit Court of Appeals in this case. A clear decision is needed in order that labor relations may be carried on without industrial strife and conflict.

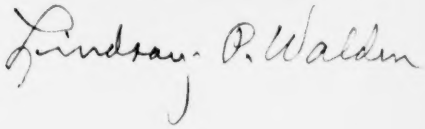
In view of the termination of the collective bargaining contract between the parties, a declaration as to respondent's rights and obligations pursuant thereto becomes moot and respondent's complaint should have been dismissed.

Conclusion

In view of the conflicts of decisions relating to the foregoing questions, the importance to the Nation of maintaining orderly labor relations in time of war and industrial peace, and that the public interest will be promoted by prompt settlement in this Court of the questions involved, it is respectfully prayed that the petition for writ of certiorari be granted and that the declaratory judgment be set aside and held for naught.

Respectfully submitted,

Lindsay P. Walden
Attorney for Petitioner



APPENDIX "A"

Section 7 of the War Labor Disputes Act

Functions and Duties of the National War Labor Board

Sec. 7 (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Number 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes," and by any other statute, shall have the following powers and duties:

(1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by

order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

(3) To require the attendance of witnesses and the production of such papers, documents, and records as may be material to its investigation of facts in any labor dispute, and to issue subpenas requiring such attendance or production.

(4) To apply to any Federal district court for an order requiring any person within its jurisdiction to obey a subpena issued by the Board; and jurisdiction is hereby conferred on any such court to issue such an order.

(b) The Board, by its Chairman, shall have power to issue subpenas, requiring the attendance and testimony of witnesses, and the production of any books, papers, records, or other documents, material to any inquiry or hearing before the Board or any designated member or agent thereof. Such subpenas shall be enforceable in the same manner, and subject to the same penalties, as subpenas issued by the President under

title III of the Second War Powers Act, approved March 27, 1942.

(c) No member of the Board shall be permitted to participate in any decision in which such member has a direct interest as an officer, employee, or representative of either party to the dispute.

(d) Subsections (a) (1) and (2) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(e) The Board shall not have any powers under this section with respect to any matter within the purview of the Railway Labor Act, as amended.

APPENDIX "B"

Pertinent Provisions of Executive Order No. 9017

Executive Order

Establishment of the National War Labor Board

Whereas by reason of the state of war declared to exist by joint resolutions of the Congress, approved December 8, 1941 and December 11, 1941, respectively (Public Laws Nos. 328, 331, 332, 77th Congress), the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and

Whereas as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes:

Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

1. There is hereby created in the Office for Emergency Management a National War Labor Board, hereinafter referred to as the Board. The Board shall be composed of twelve special commissioners to be appointed by the President. Four of the members shall be representative of the public; four shall be representative of employees; and four shall be representative of employers. The President shall designate the

Chairman and Vice-Chairman of the Board from the members representing the public. The President shall appoint four alternate members representative of employees and four representative of employers, to serve as Board members in the absence of regular members representative of their respective groups. Six members or alternate members of the Board, including not less than two members from each of the groups represented on the Board, shall constitute a quorum. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board.

2. This Order does not apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted.

3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this pur-

pose may use mediation, voluntary arbitration, or arbitration under the rules established by the Board.

APPENDIX 'C"

Paragraph 400. (Judicial Code, section 274d.)

Declaratory judgments authorized; procedure.

(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

Office - Supreme Court, U. S.
FILED
MAR 27 1945
CHARLES ELMORE CROPLEY
CLERK

(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1065

OIL WORKERS INTERNATIONAL UNION, ET AL.,
Petitioners and Appellants Below,

vs.

TEXOMA NATURAL GAS COMPANY,
Respondent and Appellee Below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

I.

Opinions Below.

The memorandum opinion of the District Judge (Tr. 66) is reported at 58 F. Supp. 132. The opinion of the Fifth Circuit Court of Appeals (Tr. 338) is reported at 146 F. (2d) 62.

II.

Jurisdiction.

It is conceded that the petition for certiorari was filed herein within ninety days after the Fifth Circuit Court of Appeals overruled the petition for rehearing.

III.

Preliminary Statement.

The petition for certiorari on its face evidences petitioners' anomalous and inconsistent contentions:

(a) While fully conceding and recognizing that the War Labor Board has no power (even had it entered an order involving the matters here in issue) to enter an enforceable order (p. 16), they contend that the courts which do have power to make binding interpretations of contracts, have been deprived of their constitutional power to do so by the creation of the National War Labor Board. The Board itself makes no claim that it may supersede the jurisdiction of the courts in that respect.

(b) Although both petitioners and respondent after September 1, 1943, proceeded in their dealings with each other on the assumption that the contract was in force, petitioners now contend that such contract terminated on August 31, 1943.

The statement of "Questions Presented" (p. 5) and "Reasons Relied on for the Allowance of the Writ" (p. 6) and the brief presented in support thereof are based on entirely erroneous assumptions as to the issues which were involved in the determinations made by the District Judge and the Circuit Court of Appeals. The cases cited in the petition and the supporting brief have no relation to the issues which are actually involved in this proceeding.

Preliminary to a discussion of the facts, respondent makes it clear that no attack has been made on any order or proceeding of the National War Labor Board; that there is no outstanding directive of that Board with respect to any of the matters here involved; that there was not pending before that Board, either at the time the suit was filed or at the time the judgment was entered, any adversary

proceeding involving any of the matters which are here involved. No award has been "directed" by that Board.

Respondent further makes it clear that its suit was not for the purpose of obtaining an interpretation of any award or directive of the War Labor Board, or a determination of the rights of any of the parties under any such award or directive. Neither the District Judge nor the Circuit Court of Appeals undertook to interpret, or declare the rights of any of the parties under, any such award or directive. The suit involved only an interpretation of, and a declaration of the rights of the parties under, the contract between the parties entered into as a result of collective bargaining; and whether under the arbitration provisions of the contract respondent could be forced to accept unsatisfactory amendments of that contract—whether arbitration can be substituted for collective bargaining.

IV.

Statement of Facts.

The "Statement of Facts" set forth in the petition (p. 2) is incomplete. Because of the inadequacy of such statement and the erroneous assumptions contained in the application as to the issues involved, it is found necessary to supplement petitioners' fact statement in order that the Court, reading the erroneous assumptions set forth by petitioners, will not obtain an erroneous impression as to the issues which actually were involved below and determined by the District Judge and the Circuit Court of Appeals.

The fundamental differences between petitioners and respondent which brought about this litigation were

(a) whether respondent had a right to *comply with* the seniority provisions of the collective bargaining contract entered into between respondent and petitioners as agent

for respondent's employees, and the seniority list prepared by petitioners in accordance with such contract;

(b) whether, under the contract, respondent had a right to adopt a 48-hour workweek without first negotiating with petitioners a supplemental agreement; and

(c) whether the arbitration provisions of the contract were available to petitioners as a vehicle to bring about modifications of the contract with respect to Items (a) and (b).

The issue as to seniority is fully discussed by the District Judge in Section VII of his memorandum opinion (Tr. 83); the issue as to a 48-hour workweek in Section VIII (Tr. 92); and the question of arbitration in Section IX (Tr. 98). The District Judge sustained respondent's contention as to each of those differences between the parties. Since petitioners here did not complain in the Circuit Court of Appeals, and do not here complain, of any of his holdings on those fundamental differences, they must be held to recognize the soundness of the holdings on those points. Thus, in this Court, they must impliedly recognize that, as stated by the District Judge (Tr. 56), petitioners "made a mistake"; that in their contention as to seniority they acted in an unconscionable way (Tr. 56); that in their contention as to length of workweek they sought to infringe upon the rights of management under the contract (Tr. 58); and that in their contention as to arbitration they sought to force upon respondent amendments to the contract which can be brought about only by negotiation (Tr. 106).

Thus, on appeal, petitioners have abandoned all their contentions which brought about this litigation. Neither in the Circuit Court of Appeals nor here do they challenge the holdings of the District Judge on the merits of the controversy. In the Circuit Court of Appeals and here they

present only two claims, (a) that because of the creation of the National War Labor Board the District Court was deprived of jurisdiction to interpret and declare the rights of the parties under a collective bargaining agreement entered into in good faith between an employer and the duly selected and recognized bargaining agent of the employees, and (b) that the collective bargaining agreement between the parties had terminated prior to the arbitration in which respondent had participated with full reservation of its rights, and, therefore, the award of the arbitrators, though void, could not be declared invalid by the courts.

While it is believed that the mere statement of the contentions of the parties here demonstrates that the application for certiorari should be denied, a statement of the facts supplementing that set forth in the application will beyond question demonstrate that the issues set forth under "Questions Presented" (p. 5), under "Reasons Relied on for Allowance of the Writ" (p. 6), and under "Specification of Errors to be Urged" (p. 10) of the petition for certiorari and supporting brief are false issues, mere strawmen, having no relation to the real questions involved in this litigation.

Upon refusal of respondent to disregard the contractual provisions as to seniority and the seniority list prepared by petitioners themselves in accordance with that contract, and upon the adoption by respondent of a 48-hour workweek, petitioners' Workmen's Committee, on November 20, 1942, filed with respondent its "General Complaint," challenging the action of respondent in according to its employee, Ralph Orr, a certain seniority status and in the adoption of a 48-hour workweek (Tr. 142-143). Replying thereto on November 28, 1942, respondent insisted that its action with respect to employee Orr was in accord with the seniority list prepared in accordance with the contract, and that since the contract, by providing for payment of time

and one-half for all hours worked in excess of forty in any one week, recognized the right of management to determine the number of hours in a workweek, there was no ground for complaint (Tr. 144-148).[1]

Upon receipt of that letter the Workmen's Committee on December 3, 1942, advised respondent that it desired to arbitrate its complaint and had named a representative of the International Union as its arbitrator (Tr. 148). Thereupon, respondent through its superintendent, on December 11, 1942, made plain its contention that neither of those claims was a proper subject for arbitration.[2] In addition to stating again its positions with respect to the seniority of employee Orr and the question of a 48-hour workweek, respondent stated that it did not deem that a claim which would tend in any manner to amend or vary the terms of the agreement between the parties was a proper subject of arbitration and expressly declined to submit to arbitration any of the claims set forth in the complaint except the alleged discrimination (Tr. 151).

On January 12, 1943, the Director of the United States Conciliation Service inquired of respondent as to its reason for refusal to arbitrate (Tr. 210). Respondent replied in substance that the Company had agreed to arbitrate that portion of the complaint which charged discrimination, but had refused to arbitrate the other matters contained in the complaint because it was deemed that both the question of seniority and the question of length of workweek were controlled by the contract and cited the holding of the New

1. Comment has already been made on the circumstance that petitioners here did not appeal from the holding of the District Judge that they were wrong and respondent was right, under the express provisions of the contract, as to both matters involved in the complaint.

2. In the complaint (Tr. 143) it was stated that the Company had discriminated against Union men. In the letter of December 11, 1942, respondent expressed its ignorance of the discriminatory acts complained of, but recognized that if there was a complaint based on discrimination, it was an appropriate matter for arbitration. Nothing further was done with respect to the asserted discrimination, and that portion of the complaint is not involved in this proceeding.

York Supreme Court in *Gleason* v. *Debevoise Company*, 11 Labor Relations Reporter, 545, to the effect that an employer need nor arbitrate with the Union a question concerning a matter which was set forth in unambiguous language in the contract. It insisted that the only medium through which the contract could be changed was the process of collective bargaining by which the parties arrived at the provisions of the existing contract, stating that the Company was willing to abide by the terms of the contract as written and expected like conduct from the Union (Tr. 211-215).

Upon the failure of the Conciliation Service to bring about an agreement, the matter was certified by its Director to the National War Labor Board (Tr. 219), which appointed a tripartite panel (Tr. 223).

A majority of that panel sustained the Union's contentions, ordering the Company and the Workmen's Committee to enter negotiations for the purpose of providing, by supplemental agreement, for placing Orr at a different position on the seniority list and to enter into a supplemental agreement as to the 48-hour workweek (Tr. 224).

Wales Madden, the chairman of the panel and the public representative, vigorously dissented from the holdings of the majority, both on the merits and as to whether or not the War Labor Board should accept jurisdiction of the dispute at all. He expressed the view that the Board should decline to accept jurisdiction over the disputes on a merit basis but should exercise its general jurisdiction to the extent of instructing the parties to follow the arbitration provisions of their bargaining contract before presenting their differences to the War Labor Board (Tr. 232). In such recommendation he said:

> "I agree with the Company in its position that the National War Labor Board cannot and should not, if it could, rewrite the contract between the Company

and the Union. I think that except where ambiguities in the contract exist the contract should be meticulously followed in determining the rights and obligations of the parties, and that even where ambiguities exist, the Board or other judicial or quasi-judicial body with jurisdiction over a controversy arising out of it should not feel free to interpose its ideas as to what the contract should have provided but should confine its endeavors to an honest effort to determine the real intention of the parties at the time the ambiguous language was used."

He further expressed the view that:

"If * * * a board of arbitrators patently disregarded the plain provision of the contract, entertained jurisdiction over the objection of the Company, and disposed of the case contrary to the provisions of the contract, then surely the aggrieved party could resort to this Board and probably to the Courts for relief." (Tr. 229.)

Upon appeal from the tripartite panel the Regional War Labor Board for the Eighth Region, as of July 3, 1943, adopted the minority recommendation of the chairman and public member of the panel in which he recommended that the Board decline to accept jurisdiction over the disputes on a merit basis and directed the parties to proceed with the arbitration of the issues in the case as provided for under the terms of the collective bargaining agreement in force and effect (Tr. 241).

In accordance with that directive, respondent, on July 9, 1943, selected Ross Rogers as a member of a board of arbitrators (Tr. 242). The Workmen's Committee selected J. W. Poe, Secretary-Treasurer of the Union, as its designee. Respondent's challenge of the qualifications, by reason of interest, of Mr. Poe as an arbitrator (Tr. 248) was rejected by the National War Labor Board on September 24, 1943 (Tr. 251). Thereupon, the selected arbitrators designated a third member of the Board.

On October 8, 1943, respondent made clear to the members of the Board of Arbitrators that it was entering into same under coercion of the order of the War Labor Board and that, as set forth in the report of the panel, the issues to be determined were

(1) whether the Company had a right to place employee Orr on the job of main engineer without first having reached an agreement with the Union that this might be done; and

(2) whether the Company had a right to go on a 48-hour workweek without first reaching an agreement with the Union to that effect.

It pointed out to the arbitrators that they had not been asked to compromise any part of the dispute or to rewrite, extend, or write into the present contract any provision or agreement not already contained therein. It stated that if the decision of the arbitrators should fall outside the scope of the existing agreement and the issues submitted, the Company might elect to take such further action as might be necessary to protect itself (Tr. 166-167).

On October 20, 1943, the Board of Arbitrators, by a divided vote, entered its award (Tr. 30) holding that employee Ralph Orr should be immediately removed from the engine room and his name removed from the seniority list, and that the Company should reimburse affected employees for the difference between what they actually made and the amount they would have received if that employee had not been placed in the engine room; that the Company did not have the right to go on a 48-hour workweek without first reaching an agreement with the Union that this might be done; and ordered that the employees demoted to a lower classification as a result of the 48-hour workweek be paid the higher rate of pay received at the time of demotion, that any employee demoted to a lower classification be

allowed to return to the classification he held prior to the inauguration of the longer workweek after the war emergency, and the re-establishing of a 40-hour workweek, *and that this be provided for in a supplemental agreement to be attached to the main agreement* (Tr. 34).

The arbitrator Rogers dissented from the holdings of the majority, referred to the opinion of Mr. Madden of the tri-partite panel, and expressed the judgment that the majority of the arbitrators had gone far afield in their awards and exceeded their jurisdiction under the provisions of the contract in respect to arbitration and the jurisdiction of the arbitrators under the directive of the National War Labor Board.

On October 27, 1943, five days after the award of the Board of Arbitrators, respondent filed in the United States District Court for the Northern District of Texas its complaint (Tr. 1) against the Union and the members of the Workmen's Committee, setting forth the history of the controversy, including the award of the Board of Arbitrators, and alleging that the award of the arbitrators was void because they had sought to go outside the arbitration provisions of the contract, because the matters covered by the arbitration award were expressly covered by the contract, and, therefore, not subject to arbitration, because the award of the Board was in excess of its powers in purporting to engraft new and additional terms onto the contract between the parties and to direct payment of certain moneys to certain employees, and because the Secretary of the Union was not a qualified arbitrator.[3]

Respondent sought a declaratory judgment of the District Court

(1) That the status of employee Orr was determined

3. Respondent at the trial dismissed without prejudice that portion of the complaint which attacked the qualifications of such arbitrator.

by the seniority list prepared under the provisions of the contract, and the question of his seniority was not arbitrable;

(2) That the Company's right to determine the length of the workweek, subject only to the requirement that for all hours worked in excess of forty for any one week it pay time and one-half, was not arbitrable;

(3) That the award of the Board of Arbitration was in excess of its powers, purported to require respondent against its will to modify the provisions of the contract as to matters not arbitrable, purported to award relief far beyond the powers of the Board, and was in all things void (Tr. 27).

As already pointed out the District Judge sustained respondent's position as to each of those matters, the judgment providing

(1) That under the contract between the parties the status of employee Orr was determined by the seniority list prepared under the seniority provisions of the contract, and the question of his seniority was not arbitrable under the arbitration provisions of the contract;

(2) That under the provisions of the contract respondent had an inherent right to determine the length of the workweek, subject only to the requirement that for all hours in addition to forty in any one week, it pay time and one-half, and that this issue was not arbitrable;

(3) That the purported award of the majority of the Board of Arbitrators was wholly void because it purported to deal with non-arbitrable matters and purported to grant relief beyond the powers of arbitrators under the provisions of the contract (Tr. 111).

As already pointed out, none of those findings of the District Judge was attacked by petitioners in the Circuit

Court of appeals, and none of such findings is attacked here.

The foregoing is a sufficient statement of the facts to permit a consideration of petitioners' contention with respect to the Court's jurisdiction as affected by the creation of the National War Labor Board; and there remains for consideration the facts dealing with whether the contract between the parties terminated on August 31, 1943.

The collective bargaining agreement between the parties, dated August 27, 1942, provided that it should become effective upon September 1, 1942, and that

> "It shall remain in effect from year to year thereafter until terminated by written notice given by either party to the other at least thirty (30) days prior to the termination of any such period." (Tr. 114.)

Therefore, unless, thirty days prior to September 1, 1943, written notice of termination was given by one party to the other, the contract automatically was renewed to August 31, 1944.

In their answer filed November 26, 1943, petitioners herein alleged that

> "on July 30, 1943, defendants notified plaintiff by letter * * * of their desire to *amend* the collective bargaining agreement, which by operation of law terminates said agreement." (Tr. 41.)

In that letter (Tr. 128) J. W. Poe, Secretary of the Union had said:

> "This is to advise you that we desire to meet with your Company on Monday, September 6, 1943, at ten o'clock A. M. to negotiate amendments to the present collective bargaining contract now in effect between Texoma Natural Gas Company, and Oil Workers International Union,"

and requested that the chairman of the Workmen's Com-

mittee be contacted and a suitable place for the meeting arranged.

Acknowledging receipt of that letter respondent, through its Superintendent of Production, inquired:

> "Will you please advise whether such letter is intended to serve as a notice of termination of the contract between the Union and the Company in accordance with Section 1, Article I, of the Collective Bargaining Agreement." (Tr. 128.)

In reply, the Secretary of the Union said:

> "Relative to your inquiry if my letter of July 30, 1943, was intended to serve as a notice of termination of the contract between the Union and the Company, as set out in Section 1, Article I, of the Agreement, I wish to say that we did not intend to cancel the entire Agreement but do wish to make certain amendments to the contract for the purpose of clarification. I have not read the amendments that the employees have prepared, therefore, I am not now in position to state these amendments.
>
> "If you do not desire to go into negotiations to make such amendments without terminating the present Agreement, we shall then naturally ask to terminate the present Agreement and proceed to negotiate another one.
>
> "However, until such time you are notified to this effect the present agreement shall be in full force and effect."[4] (Tr. 129.)

Following receipt of that letter respondent's Superintendent of Production, on August 24, 1943, wrote the Union as follows:

> "This will acknowledge receipt of your letter of August 20, 1943, advising that it was not the intention by your letter of July 30, 1943, to cancel the agree-

4. The last sentence of the foregoing quotation is garbled at Tr. 130 by the omission of the words "the present agreement shall be in full force and effect." The correct copy of the paragraph is set forth in the Court's opinion at Tr. 80.

ment between this Company and the Union, but that the Union simply wishes to make certain amendments for the purpose of clarification. We therefore consider the Agreement, as now written, binding on both parties until September 1, 1944; however, the Company is agreeable to meeting with representatives of the Union September 6, 1943, for the purpose of considering clarifying the amendments of the Agreement.

"The Company may have certain suggestions to offer for clarifying the Agreement which it may propose at the time of the meeting of the representatives of the Union and the Company on September 6." (Tr. 130.)

Following the exchange of those letters, negotiations for amendments to the contract were carried on, and those negotiations were still in progress at the time of the trial (Tr. 81).

Meanwhile, long after August 31, 1943, to-wit, on October 8, 1943, the parties proceeded to an arbitration under the contract (Tr. 166) as directed by the War Labor Board, and on October 20, 1943, the Board of Arbitrators (one of whom was the Union's Secretary) entered its order directing the execution of supplemental agreements "to be attached to the main agreement" (Tr. 34). The award expressly stated that it was the duty of the arbitrators

"to take into consideration *only* the articles of the agreement signed by both parties and placed in effect on September 1, 1942."

The Secretary of the Union testified on December 6, 1943, that Article III of the contract dealing with seniority and Article V of the contract dealing with holiday pay were in effect. He said:

"*The entire contract* is in effect until a new one is negotiated or amended." (Tr. 141.)

Later, being recalled by counsel for petitioners, he stated that he had discussed the contract with his attorney

and with the International officers; that after hearing the opinion of counsel and the International officers he thought the contract was *not* in effect; that he reached that conclusion by reason of *advice on the law only* (Tr. 262).

Witness Moore, chairman of the Workmen's Committee, gave similar testimony. He said that he had discussed the matter with petitioners' counsel and the International officers; that when they wrote respondent's Superintendent of Production "a letter to amend the contract", they thought the contract was in full force and effect, but that

> "*after talking with our attorney* we see that the contract is not in effect." (Tr. 261.)

The District Judge, upon the conclusion of evidence, said:

> "I hold that the contract is in effect. I hold that the evidence is undisputed that it is in effect; every circumstance and all of the evidence of everybody all the way through, letters included, show that it is in effect." (Tr. 66.)

Whether or not the contract had terminated is fully discussed by the trial court in Section VI of his memorandum opinion (Tr. 77-83). The Circuit Court of Appeals on that point said:

> "We agree with the Court below that the contract is in force and effect."

V.

Reply to "Questions Presented".

Under the heading "Questions Presented" petitioners propound four queries which they think should be answered by this Court. Each of those queries presents an erroneous interpretation of the holdings of the District Judge and the Circuit Court of Appeals. They are here briefly discussed in the order set out in the application.

1. There is here involved no "award" of the National War Labor Board, and it is, therefore, not material whether an award of that Board, having no legal and binding effect on the parties, would constitute or create such a justiciable controversy or actual controversy as would be sufficient to vest jurisdiction in a Federal Court under the Declaratory Judgments Act.

No complaint was made by respondent of any action of the War Labor Board. The only order of that Board was one requiring the parties to arbitrate *under the provisions of their contract* the matters in dispute. In promulgating that directive the Board assumed that arbitrators would not "dispose of the case contrary to the provisions of the contract" (Tr. 229). The Board reserved no supervisory control over the action of the arbitrators, by appeal or otherwise. It merely directed the parties to proceed to an arbitration of their differences *under their contract.*

Obviously, respondent suffered no legal injury by this directive, whether it was legally enforceable or not. It could proceed as it did, to compliance with the directive, fully preserving its right to insist that the differences were non-arbitrable.

When, however, the report of the arbitrators, purporting to act under the contract was filed, a different situation was presented. A justiciable controversy between the parties existed, even when the complaint was filed, both as to the interpretation of the contract and the arbitrability of the differences. That controversy became more acute upon the filing of the purported award. An additional justiciable controversy as to the validity of the award and respondent's legal liabilities thereunder then arose.

That purported "award" undertook to *require* respondent to disregard its contractual obligations to one of its employees, to remove from the engine room an experienced

employee, and strike his name from the seniority list; to reimburse other employees for the differences between the wages that they had received, and the wages they would have received if that employee had not been placed in the engine room; to require that all employees automatically demoted as a result of the adoption of a 48-hour week be paid at the higher rates of pay they would have received but for such demotion; and that a supplemental agreement be entered into providing that after the war emergency, and upon returning to a 40-hour workweek those demoted would be advanced to their original classification. Any individual employee obtaining purported rights under such award could have instituted suit against respondent for enforcement of such award if it were valid.

Clearly, respondent could not be expected to wait longer to obtain a declaration of its contractual rights and the validity of the award. The award of the arbitrators was entered fourteen months after the controversies first arose. Respondent was faced with an intolerable situation in its operations, with continuing obligations to some employees if the award of the arbitrators was valid, and to other employees if the award was invalid. Under such circumstances, there was nothing for it to do except to obtain a declaration of its rights and obligations under its contract and the award, binding and not merely advisory.

Obviously, no relief could be obtained through the War Labor Board. In directing an arbitration under the contract, it had reserved no control over the award, by appeal or otherwise.

Even if jurisdiction had vested in the Board to enforce the award, its directive would have been expressly subject to discontinuance if a court should hold the award invalid. The Board fully recognizes that an order of enforcement in no way prejudices the right of a party to appeal to a

court of competent jurisdiction for a judicial declaration of the rights and obligations flowing from the award, and accords to courts a power which it concedes it does not possess,—the power to make a judicial declaration of the rights and obligations of parties (Tr. 259).

That the award of the arbitrators (not a directive of the War Labor Board) created an actual justiciable controversy cannot be denied. The first "question presented" obviously seeks to present a false issue.

2. For the same reason, the second "question presented" (p. 16 of application) is a false issue. There has been no award directed by the War Labor Board. No administrative remedy of Review of the award of the arbitrators by the War Labor Board was available to respondent.[5] If the Board had a right of review, it would not constitute a "remedy" since its action would only be advisory.

The assumption that issues arising under the award were "currently pending before said Board for adjudication, settlement and final determination" is wholly without support. Nothing whatever was pending before the Board when the complaint was filed in the District Court.

On October 28, 1943, the day after the suit was filed, the Union requested the Regional War Labor Board to enforce the award. That Board did nothing about the request, except to refer the letter to its legal division (Tr. 169). Although the case was not tried until December 6, 1943, that division took no steps toward enforcement of the award, and entered no appearance in this proceeding,—another recognition by the Board that determinations of the validity of such contract arbitrations are for the courts.

3. Respondent finds no fault with the affirmative of the

5. Even if Section IV of the Board's statement of policy (Tr. 259) were found applicable to contract arbitrations made under a directive, a review thereof could be obtained, as stated therein, only on the Board's "own initiative".

query "Should a declaratory judgment be denied where another remedy will be more effective under the circumstances." It is merely the announcement of a principle many times applied by the Courts. The difficulty in petitioners' case is that they do not point out *any* other effective remedy.

When the award of the arbitrators was filed, it became necessary for respondent either to comply with the award, and thus deprive some of its employees of rights under the contract, lose the services of an old and valued employee, and continue its operations at much higher costs, or to refuse to comply with the award, and become embroiled with differences as to rates of pay of another group of employees, possibly resulting in litigation in either event.

It was not required to wait for these disturbances to arise and confuse its operating problems. As well observed by the Circuit Court of Appeals (at 146 F. (2d) 65) it was not required to wait until sued for damages for breach of contract or for specific performance. Declaratory judgment proceedings were available as a means of "securing an interpretation of the contract during its actual operation" and "stabilizing an uncertain and disputed relation."

It is clear that the reasoning of this court in *Moore* v. *Illinois Central R. R. Co.*, 312 U. S. 630, 635, (dealing with the Adjustment Board provided for by the Railway Labor Act[6]) applies here. The machinery provided by the War Labor Disputes Act and Executive Order No. 9017 was not based on a philosophy of legal compulsion but for the purpose of establishing a system for peaceful adjustment and mediation voluntary in its nature.[7]

It is conceded by petitioners that the functions of the

6. 45 USC, Sec. 153(i).

7. See also *Adams* v. *N. Y. C. & St. Louis Ry. Co.*, 7 Cir., 121 F. (2d) 808; *Pennsylvania R. Co.* v. *U. S. R. Labor Board*, 261 U. S. 72, 84; *Pennsylvania Ry. System* v. *Pennsylvania R. R. Co.*, 267 U. S. 203, 216.

Board are advisory only, that its so-called directives are not enforceable or reviewable. Thus, at page 13 of petitioners' supporting brief, they say

> "even if petitioner should have obtained an order of said Board enforcing said award, such award would not be reviewable or enforceable."

Again at page 16,

> "It is plain that the issuance of the directive order of the National War Labor Board, directing the parties to arbitrate, and that any further order directing compliance therewith, did not and would not in any wise affect the legal rights of the respondent, and that its continued effectiveness could not and would not affect such rights."[8]

Since it is conceded that the National War Labor Board has no power to make a binding determination of the validity of the arbitration award, it is obvious that there was no effective remedy available to respondent except a judicial determination of its rights. Therefore, even if an appeal could have been taken to the War Labor Board, or if proceedings for enforcement had been pending there, a suit for declaratory judgment would still have been an appropriate remedy available to respondent.

Petitioners erroneously assume throughout the petition and supporting brief that respondent has challenged some action of the National War Labor Board. It has not done so. It sought only a determination of its rights under its contract, and the validity of an award resulting from an arbitration under its contract.[9]

8. On this point, see *Baltimore Transit Co.* v. *Flynn* (D. C. Md.) 50 F. Supp. 382, 387; *Employers Group of Motor Carriers* v. *National War Labor Board* (U. S. App. D. C.) 143 F. (2d) 145, 149; *National War Labor Board* v. *Montgomery Ward & Co.* (U. S. App. D. C.) 144 F. (2d) 528, 530.

9. The fact that respondent, with full reservation of its rights, entered into the arbitration under a directive of the War Labor Board, does not make the award an award of that Board. It is still an award purportedly made under the contract, and respondent's rights are the same as they would have been if the arbitration had been participated in by respondent, with the same reservation, without any previous directive (advice, to use petitioners' definition) of the Board.

In *Lehigh Coal & Navigation Co.* v. *Central R. R. of New Jersey* (D. C. E. D. Pa.) 33 F. Supp. 362, 365, Judge Kalodner well summarized the decisions interpretive of the Declaratory Judgments Act as establishing the following principles:

That a prerequisite to relief is the existence of a definite and concrete controversy, touching the legal relations of parties having adverse legal interests; that such a judgment should be granted where it will serve a useful purpose in clarifying and settling legal relations and will terminate and afford relief from insecurity, uncertainty and controversy; that the discretion to grant or refuse relief should be liberally exercised to effectuate the purposes of the Act, and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; that the primary object of the Act is to afford a speedy and inexpensive method of adjudicating legal disputes before damage has actually been suffered, and the statute should be liberally construed to that end; that construction and interpretation of legal instruments is the principal function of a declaratory judgment proceeding; and that the existence of another remedy does not preclude relief.[10]

It is respectfully submitted that the entry of a declaratory judgment in this case is fully justified by those principles.

4. Whether notice of a desire to "amend" a contract constitutes a termination is not the issue. The issue is whether under the facts of this case the notice which was given did terminate the contract. Both the trial judge and the Circuit Court of Appeals held that under the facts there was no termination. This Court therefore will require conclusive evidence of termination before it will set aside that finding, and such evidence does not appear in the record.

10. It is expressly provided in Rule 57 of the Rules of Civil Procedure that the existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

The notice (Tr. 128) given was not one of termination. It only expressed a desire to "negotiate amendments." Even the author of the letter did not know the purport of the desired amendments. When asked by respondent the direct question whether the letter was intended to serve as a notice of termination (Tr. 128), he disclaimed any such intention, stating that the Union did not intend to cancel the agreement, but did wish to make certain amendments "for the purpose of clarification"; that he had not read the proposed amendments, and was not in a position to state them (Tr. 129).

In that letter he said

> "If you do not desire to *go into negotiations* to make . . such amendments without terminating the present agreement, we shall *then* naturally ask to terminate the present agreement and proceed to negotiate another one. However, until such time (as) you are notified to this effect *the present agreement shall be in full force and effect.*"

It is not denied that the Company, after receiving that letter, did "go into negotiations" concerning the proposed amendments, and that such negotiations were still in progress when this case was tried in the District Court. It is not claimed that any notice of cancellation was ever sent unless the letter of July 30, 1943, was such a notice.

After September 1, 1943, the parties carried on, *under the contract*, the purported arbitration. The author of the letter of July 30, 1943, acted as an arbitrator. The award, signed by him, purported to require respondent to remove an employee from the seniority list, prepared and existing under the authority of the contract, to negotiate a supplemental agreement to be attached to the main agreement, and to "abide by the terms of the collective bargaining agreement" in its future dealings with its employees (Tr. 34-35).

This same author of the letter of July 30, 1943 at the trial testified that "the entire contract is in effect until a new one is negotiated or amended" (Tr. 270). He later testified that after discussing the matter with his attorneys and with the International officers, and hearing their opinions, he thought the contract was *not* in effect, but that he reached that conclusion *by reason of advice on the law only* (Tr. 274-275).

Clearly, the evidence does not even raise the issue, much less conclusively establish, that the contract had terminated. It was never so considered by either the Union or the Company. Without regard to what might have been held to be the meaning and purpose of the letter of July 30, 1943 (Tr. 147), considered alone or other circumstances, petitioners are bound by the interpretation placed on that letter by the letter of August 20, 1943 (Tr. 129).

VI.

Reply to "Reasons Relied On for the Allowance of the Writ".

The so called "reasons" urged by petitioners in support of the petition (p. 6 of the petition) are, like the "questions presented", founded on erroneous assumptions of fact, and misinterpretations of the holdings of the Circuit Court of Appeals. Respondent replies to such reasons in the order set forth in the application.

A. There has been no holding of the Circuit Court of Appeals that "an arbitration award directed by the National War Labor Board creates a justiciable controversy." No award has been directed by the Labor Board. It only directed respondent to arbitrate under the provisions of the contract. No complaint is herein made of that directive. The complaint is as to the scope of the

award. The justiciable controversy is as to the legal rights and liabilities of the parties under their contract, not their legal rights and liabilities under any directive (advice) of the Labor Board. This clearly appears from the following extract from the opinion of the Circuit Court of Appeals:

> "The Court below found that the controversy between the parties related to their legal rights and liabilities *under their contract;* that the parties had taken adverse positions with respect to their respective rights and obligations; that, therefore, a justiciable controversy existed appropriate for judicial determination under the Declaratory Judgments Act. We agree" (Tr. .....).

It is clear that so-called "reason" A is based on erroneous assumptions as to the holdings of the Circuit Court of Appeals. There is, therefore, no conflict between the holdings of the Circuit Court of Appeals and the holdings of the United States Court of Appeals for the District of Columbia in *Employers Group of Motor Carriers* v. *N. W. L. B.*, 143 F. (2d) and *N. W. L. B.* v. *Montgomery Ward & Co.*, 144 F. (2d) 528.

B. "Reason" B is also based on an erroneous assumption since the Circuit Court of Appeals did not hold that courts have jurisdiction to review or determine "issues growing out of National War Labor Board directives even while such issues are pending before such Board." The issues here involved grow out of the contract, not out of any directive, and the Court's holding was that the Court would have had jurisdiction to determine the judicial questions involved even if a controversy with respect thereto had been pending before the Board.[11]

11. The Court below cited the Employer's Group of Motor Carriers case in support of its holding that the National War Labor Board is not, under the law, vested with judicial functions, and has no power to enforce its determinations, called "directives"; that it is not a substitute for the courts; and that the pendency of a controversy before it is not a bar to a suit in the courts.

C. Nothing said in the opinion of the Circuit Court of Appeals in this case is in conflict with any of the holdings in any of the cases referred to on page 7 of the application.

In *Aetna Casualty Company* v. *Quarles*, 92 F. (2d) 321, the Court merely exercised its discretion in refusing to enter a declaratory judgment because such a judgment would not settle the matter, and there was then pending *in a court of competent jurisdiction* a suit in which all matters in controversy could be determined.

Respondent has been unable to understand in what way petitioners contend that the opinion of the Circuit Court of Appeals in this case is in conflict with the opinion of the United States Circuit Court of Appeals for the District of Columbia in *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 (judgment affirmed by equally divided court 319 U. S. 733). That case related to an interpretation of the Railway Labor Act of June 21, 1934, 48 Stat. 1185, 45 USCA Sec. 151 *et seq.*, and to whether parties who had submitted their differences on the merits could, by declaratory judgment proceedings, attack the award. The Court, in holding that they could not do so, stressed the enforcement provisions of that Act which are not contained in the Act or the Executive Order creating the National War Labor Board.

The reasoning of the majority opinion in that case is in complete harmony with the holdings of the Circuit Court of Appeals in this case.

Nor is the holding in this case in conflict with the holdings in *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 101 F. (2d) 426. The Act there involved contained express provisions for judicial review, and it was only held that the prescribed method of review was exclusive.

Clearly, "reason" C relied on by petitioners does not support the petition, both because no dispute was pending before the National War Labor Board at the time respondent filed its suit and because the Act creating the Board provides for no administrative review.

D. The holding of the trial judge, and the Circuit Court of Appeals that the contract was in force was not a determination of either Federal or local law. It was a determination of fact, fully supported by the evidence. There is no evidence on which a different finding could be based.

E. There is no contrariety of view among the courts which requires an "authoritative and elucidating decision" as to the powers of the National War Labor Board, or which calls for an exercise of this Court's power of supervision. Both petitioners and respondent recognize that the recommendations of that Board are advisory only, not binding. It it is important that administrative action should be binding, that is for the Congress to determine. In this case, however, no action of the Board is challenged, and the question is academic.

Obviously, collective bargaining agreements should be stable. The stability of contracts, however, will best be promoted if all parties comply therewith. It will not be promoted by the action of either employer or employee, reflecting attempts to avoid contractual obligations or attempts, through invalid awards in arbitration proceedings, to effectuate amendments of contracts,—a matter for negotiation and agreement.

VII.

Reply to Petitioners' Supporting Brief.

It has been necessary, in the preceding sections of this Opposition to the Petition for Certiorari, to present in some detail the facts reflected in the record, the questions presented, and the reasons relied on by petitioners for the allowance of the writ. Therefore, in the interest of brevity, respondent does not present a formal brief in reply to petitioners' supporting brief; but presents the following succinct answer to the pertinent sections of the argument contained in that brief.

1. Justiciable Controversy. At page 13, the argument is made that there was an absence of any showing that petitioners had threatened to enforce the award. The mere existence of the award, purportedly made under the contract, constituted a threat. Respondent was not required to wait for a suit to be filed by individual employees to enforce the award.[12] Nor was it required to wait longer to determine the nature of its continuing obligations to its employees.

2. Pending Controversy. Under Section II (p. 17) petitioners "assume" that the Board retained jurisdiction over the award, but the directive itself retained no such jurisdiction (Tr. 241). Nor was the Court's jurisdiction ousted by the action of petitioners, after suit was filed, in filing with the Regional War Labor Board their petition for enforcement of the award (on which no action was taken) or in filing with the National Labor Relations Board a petition for a strike vote.[13]

12. *Lehigh Coal & Nav. Co. v. Central R. R. of N. J.*, 33 F. Supp. 362, 367.

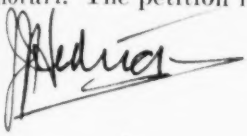
13. Action which petitioners frankly concede was intended "as an economic means of *persuading* respondent to comply with said award". (p. 18 of brief).

3. Exhaustion of Administrative Remedies (p. 23). Since no effective administrative remedy was available to respondent, it is obvious there was no default or failure of respondent. Even if the War Labor Board could have, and had, reserved jurisdiction over the award of the arbitrators, that Board could not have rendered a binding interpretation. It could only recommend. It could not exercise a judicial function. Respondent was entitled to a judicial determination of its rights under the contract and the validity of the arbitration award, tested by the contract.

4. Termination of the Contract (p. 26). We have already demonstrated, in our discussion of the 4th "question presented" (p. 21, *supra*) that the finding of both courts below to the effect that the contract had terminated is required by the undisputed facts. It is not important whether (as stated by petitioners but not shown by evidence) it has become customary for unions to say they wish to "amend" rather than "terminate" their contracts. They should say what they mean. Certainly, in a case like this, where the employer calls for an interpretation of the intention, and the Union replies that it does *not* desire to terminate, but that the contract shall remain in full force and effect until further notice is given, the Union is bound by that interpretation.

Conclusion.

The decisions below are in full accord with adjudicated principles. There is no substance in the petition for certiorari. The petition for a writ should be denied.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1065

OIL WORKERS INTERNATIONAL UNION, LOCAL 463 et al.,
Petitioner and
Appellant below,

vs.

TEXOMA NATURAL GAS COMPANY,
Respondent and
Appellee below

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING ON PETITION FOR FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

That the petition for writ of certiorari in the above styled and numbered case was denied by your Honorable Court on April 9, 1945, and that petitioner files

this petition for rehearing and reconsideration thereon pursuant to Rules 33 and 44 of the Revised Rules of the Court.

II

The denial of the writ leaves unsettled four important questions of law wherein separate circuit courts of appeals have rendered conflicting decisions on the same matters.

III

The denial of the writ leaves unsettled an important question of federal law which has not been, but should be, settled by this court and permits a decision of the circuit court of appeals to stand which sanctions a departure by a lower court from the accepted and usual course of judicial proceedings such as to call for an exercise of this court's power of supervision, particularly;

> By holding, in a labor dispute case, that the exhaustion of the administrative remedies granted by the War Labor Disputes Act and Executive Order No. 9017 of January 12, 1942, to employers and employees, *is not a prerequisite* to the bringing of a court action for relief, and by holding that a "justiciable controversy" existed between the parties appropriate for relief under the Declaratory Judgment Act. And more particularly, should this court exercise its supervision over the foregoing holding, because of the following Congressional Declaration of Public Policy in Labor matters (Title 29, United States Code, not heretofore cited in the petition), to-wit;

Paragraph 102—*Public Policy in Labor Matters Declared*

In the interpretation of Sections 101-115 of this title and in determining the jurisdiction and authority of the Courts of the United States, as such jurisdiction and authority are defined and limited in such Sections, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are hereby enacted. Mar. 23, 1932, c. 90, Paragraph 2, 47 Stat. 70.

Paragraph 108 — *Noncompliance with Obligations Involved in Labor Disputes or Failure to Settle by Negotiation or Arbitration as Preventing Injunctive Relief*

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor disputes in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, Paragraph 8, 47 Stat. 72.

IV

Wherefore, petitioner prays that your Honorable Court reconsider its petition for writ of certiorari heretofore filed and that upon rehearing thereof said writ be issued as prayed for.

This petition is presented in good faith and is not for the purpose of delay.

Respectfully submitted,

LINDSAY P. WALDEN
Counsel for Petitioner